NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner

VERSUS

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in adopting and applying a uniform rule that ballots marked only on the back shall be deemed void, the National Labor Relations Board reasonably exercised its discretion to establish procedures for conducting representation elections in light of acknowledged Board policy to allow a ballot if there is a clear expression of preference, regardless of the irregularity of the mark on the ballot.

LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Manhattan Corporation and Manhattan Guest House, Inc. are currently leasing their facilities to Health Care Management, Inc. Health Care Management, Inc. is a wholly owned subsidiary of ARA Services.

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STATEMENT OF THE CASE

On June 23, 1978, a representation election was held. A total of 93 ballots were cast, 43 in favor of the Union, 42 against, 5 challenged. (J.A. 26a) The three remaining ballots were voided by the Board Agent on grounds that they were marked irregularly. Of the three voided ballots, two of the ballots had no markings on their printed side but were marked with an "X" on the blank reverse side such that the "X" would appear in the "NO" square on the face of the ballots. The remaining ballot had no marking on its printed side but had the word "NO" written on the blank reverse side. (J.A. 22a, 24a) The ballots were folded when handed to the employees with

only the blank portion thereof visible. (J.A. 29a)

Respondent filed objections to the conduct of the election alleging that the three ballots voided by the Board evidenced a clear manifestation of voter intent and should have been counted. The Board's Acting Regional Director recommended that Respondent's objections be overruled and that the challenges to two of the ballots be sustained. (J.A. 31a) The challenges to the three remaining ballots were sustained in accordance with a stipulation entered into by Respondent and the Union. (J.A. 28a) Respondent filed exceptions to the Regional Director's report and on January 26, 1979 the Board, with Member Murphy dissenting, issued a Decision and Certification of Representative adopting the Regional Director's recommendations that Respondent's objections be overruled, and certified the Union. (J.A. 24a, 25a)

Respondent refused to bargain with the Union thus precipitating an unfair labor practice complaint duly answered by Respondent. Thereafter, General Counsel for the Board filed a motion for summary judgment and the Board issued an order transferring the proceeding to the Board. The motion for summary judgment was granted. (J.A. 10a - 21a)

The Fifth Circuit Court of Appeals denied enforcement of the Board's order relying on its decision in *N.L.R.B. vs. Titche-Goettinger Company*, 433 F. 2d 1045 (5th Cir. 1970). There the Court held that the Board's practice of voiding ballots marked only on the reverse side is inconsistent with the Board's general policy of allowing a ballot if there is a clear expression of voter preference, regardless of the irregularity of the mark on the ballot. (J.A. 2a - 3a)

ARGUMENT

The Board asks this Court to grant certiorari on the basis that the Fifth Circuit's decision below infringes upon the broad discretion entrusted to the Board in establishing and implementing rules governing representation elections, and that it therefore constitutes a "serious departure" from well-established principles propounded by this Court. That the Board has been accorded broad discretion is unquestionable. However, that this discretion is subject to judicial scrutiny and that it is not absolute is equally unquestionable.

> Courts should be "slow to overturn an administrative decision," . . ., but they are not left "to 'sheer acceptance' of the Board's conclusions," . . . . Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

N.L.R.B. v. Brown, 380 U.S. 278, at 291-2 (1965).

The Fifth Circuit's decision below is totally consistent with the above-stated principle in *Brown*, which delineates the circumstances under which federal courts may and, indeed, ***should*** intervene in administrative determinations.

Further militating against the granting of the petition sought is the soundness of the Fifth Circuit's decision, when one considers the Board rule at issue. Acknowledged Board policy is to count a ballot (1) if there is a clear expression of voter preference, and (2) so long as the mark on the ballot does not

identify the voter, regardless of the irregularity of the mark. *Knapp-Sherril Co.*, 171 N.L.R.B. 1547 (1968). In attempting to support its automatic exclusion of all ballots marked only on the reverse side, the Board argues that these ballots meet neither of the two requirements.

First, the Board contends that a ballot marked only on the reverse side requires the exercise of complete speculation to ascertain voter intent. This contention is specious. Suppose the voter had written "No, I do not want a union" across the reverse side of the ballot. Does there exist a clearer indicia of voter intent? The Board has counted ballots which give rise to greater speculation. *E. g., Abtex Beverage Corp.*, 237 N.L.R.B. 1271 (1978) (Board counted ballot with "X" in both "YES" and "NO" squares where marking in "NO" square had been written over with circular markings); *J.L.P. Vending Company, Inc.*, 218 N.L.R.B. 794 (1975) (Board counted ballot that contained attempted erasure of line in "NO" box and a heavier line in "YES" box).

Next, the Board contends that the reverse side markings provide a means for identifying the voter and therefore violate ballot secrecy. This contention is equally unpersuasive. Marking the word "NO" or the letter "X" on the blank side of the ballot provides no greater means for voter identification than do the ballot markings approved by the Board in earlier decisions. *E. g., N.L.R.B. v. Sauk Valley Manufacturing Company, Inc.*, 486 F. 2d 1127 (9th Cir. 1973) (Board counted two ballots which were marked with the Spanish word "si" in the "YES, SI" box rather than by an "X"); *Western Electric Company, Inc.*, 97 N.L.R.B. 901 (1951) (Board counted (1) ballot with word "yes" above square under petitioner's name and with square blackened, (2) ballot with word "yes" written on each side of the petitioner's square and with an "X" in petitioner's square, (3) ballot with "CIO" written in the petitioner's square, and (4) ballot with an oblique line in the petitioner's square.);

F.J. Stokes Corp., 117 N.L.R.B. 951 (1957) (Board counted two ballots marked respectively (1) with an "X" in the "NO" square and "HELL" to the right, and (2) with an "X" in the "NO" square and "Hell No" to the right. It is worthy of mention that the Board does not suggest that the disputed markings in the instant case were used for identification purposes.

The validity of a ballot marked only on the reverse side is not a novel question in the federal judiciary. Four decisions emanating from three federal judicial circuits resolved this issue prior to the decision of the court below. *N.L.R.B. v. Wrape Forest Industries*, 596 F. 2d 817 (8th Cir. 1979); *Roberts Door & Window Co. v. N.L.R.B.*, 540 F. 2d 350, (8th Cir. 1976); *N.L.R.B. v. Tobacco Processors, Inc.*, 456 F. 2d 248, (4th Cir. 1972); *N.L.R.B. v. Titche-Goettinger Co.*, *supra*. In each case the Court was presented with the identical issue raised by the Board herein. In each case the issue was resolved against the Board. Here, the Court below gave full consideration to the issue raised before this Court and decided it correctly in accordance with an unbroken line of authority.

The Board in its petition would have this Court believe that at stake here is the continued viability of established principles respecting the Board's authority to enact rules governing representation elections. The Board has exaggerated the importance of this case. This case presents no challenge to such principles. What is presented is the question of Board authority to create an irrebutable presumption that every ballot marked on the reverse side makes ascertaining voter intent impossible and inherently identifies the voter marking such ballot. As noted above, every circuit that has considered this Board policy has found it to be unsupportable and has exercised its proper authority to reject the policy. *N.L.R.B. v. Brown*, *supra*. Such an arbitrary and unreasonable policy is not worthy of judicial sanction, nor is it worthy of this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the respondent's brief in connection with the above and foregoing has this day been served by first class mail upon the following counsel at the address listed below:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20530

This 15th day of May, 1981.

Joseph Onebane

JOSEPH ONEBANE